IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES A. SCHOLL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47556

FILED

SEP 05 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is a direct appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of burglary and one count each of first-degree kidnapping with the use of a deadly weapon, robbery with the use of a deadly weapon, first-degree arson, attempted robbery with the use of a deadly weapon, and first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge. The district court sentenced appellant James A. Scholl to serve concurrent and consecutive terms totaling life in prison without the possibility of parole.

Scholl argues that the district court erred by denying his motion to sever the charges, which arose from two separate incidents. "'[J]oinder decisions are within the sound discretion of the trial court and will not be reversed absent an abuse of discretion.'"[1] NRS 173.115 provides that joinder of charges based on separate acts or transactions is proper when the acts or transactions are "connected together or

[1]Tillema v. State, 112 Nev. 266, 268, 914 P.2d 605, 606 (1996) (quoting Robins v. State, 106 Nev. 611, 619, 798 P.2d 558, 563 (1990)).

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constituting parts of a common scheme or plan." In addition, this court has held that joinder is proper when "evidence of one charge would be cross-admissible in evidence at a separate trial on another charge."[2] We conclude the district court did not abuse its discretion in joining the charges. The two robberies were sufficiently similar and close in time to establish a common scheme or plan.[3] Further, evidence of the first robbery would have been admissible at a separate trial on the second robbery to show Scholl's felonious intent in entering the second cab.[4]

Scholl next argues that there is insufficient evidence to support his conviction for first-degree kidnapping with the use of a deadly weapon. "The relevant inquiry for this Court is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[5] NRS 200.310(1) provides in relevant part that "[a] person who willfully . . . inveigles [or] entices . . . a person by any means whatsoever . . . for the purpose of committing . . . robbery upon or from the person . . . is guilty of kidnapping in the first degree." Here, the jury could have properly found that Scholl inveigled or enticed victim Kebede Getahun away from the pick-up location for the purpose of robbing him, and that this movement had independent significance from the robbery

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[2]Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989).

[3]See Tillema, 112 Nev. at 268, 914 P.2d at 606-07.

[4]See NRS 48.045(2); Tinch v. State, 113 Nev. 1170, 946 P.2d 1061 (1997).

[5]Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

itself.[6] However, the record does not support that Scholl used a deadly weapon in the commission of the kidnapping.[7] The State does not argue, and the testimony does not support, that Getahun knew Scholl had the brick and drove him out of fear of force or harm; rather, Getahun only knew about the brick inside the tee shirt after Scholl first struck him with it. Thus, Scholl did not use the brick to get Getahun to drive; he simply asked Getahun to take him to another location, which Getahun consented to do. We therefore affirm the kidnapping conviction, but conclude that the deadly weapon enhancement must be stricken.

Scholl also argues that the district court erred by ruling that hearsay statements made by Pairoj Chitprasart, the victim of the second robbery and the murder, were nontestimonial hearsay not subject to exclusion per Crawford v. Washington.[8] Scholl argues the district court further erred by admitting the statements under the excited utterance exception to the hearsay rule.[9] "The decision to admit or exclude [hearsay] evidence is within the sound discretion of the district court and the district court's determination will not be disturbed unless manifestly wrong."[10] We conclude that the district court's decision was not manifestly wrong. Within minutes after Scholl tried to rob him, doused him with gasoline, and set him on fire, Chitprasart related those events to a paramedic. The

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[6]See Mendoza v. State, 122 Nev. 267, 275-76, 130 P.3d 176, 181 (2006).

[7]See NRS 193.165(1).

[8]541 U.S. 36 (2004).

[9]See NRS 51.035; NRS 51.095.

[10]Tabish v. State, 119 Nev. 293, 310, 72 P.3d 584, 595 (2003).

district court could have properly concluded that he "was under the stress of excitement caused by the event or condition."[11] The district court could also properly have concluded that Chitprasart's statement to the paramedic was nontestimonial. It was not an affidavit, not made during police interrogation, and was not prior testimony that Scholl had no opportunity to test with cross-examination; nor was it a statement that an objective witness would reasonably expect to be used prosecutorially because it was made to a paramedic who was about to treat Chitprasart's injuries and asked him what had happened.[12] We therefore conclude the district court did not abuse its discretion in admitting the testimony.

Next, Scholl argues that the district court erred by admitting prejudicial photographic evidence, specifically photographs of Scholl. At trial, Kimberly Stoffels testified that she saw a man in the area of the Chitprasart robbery around the time it occurred; she further testified that, when police asked her to view Scholl in a show-up the day after the robbery, she was "fairly sure" Scholl was the man she had seen. The prosecutor showed Stoffels photographs of Scholl taken near the time of his arrest; she testified that the man in the photographs was the man she identified previously. She was not able to make an in-court identification of Scholl. Scholl argues that admission of the photographs was error because they bolstered Stoffels' allegedly tainted show-up identification of Scholl and improperly rehabilitated her testimony. We conclude the

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[11]NRS 51.095; Medina v. State, 122 Nev. 346, 351-52, 143 P.3d 471, 475 (2006).

[12]See Medina, 122 Nev. at 354, 143 P.3d at 476; Harkins v. State, 122 Nev. ___, ___, 143 P.3d 706, 714 (2006).

district court did not abuse its discretion in admitting the photographs. The photographs were relevant to show the changes in Scholl's appearance, and they were admitted before Stoffels was unable to make an in-court identification of Scholl.

Scholl also argues that the jury instructions defining malice and malice aforethought were unconstitutionally vague and ambiguous. Contrary to Scholl's argument, as the State points out, instruction 20, which defined malice aforethought, did not contain the phrase "heart fatally bent on mischief." And this court has previously affirmed instructions containing language similar to the remaining language of instruction 20 to which Scholl objects.[13] Scholl contends that instruction 21, which defined malice, is unconstitutionally vague in its use of "abandoned and malignant heart." This instruction was taken from NRS 200.020, which has been approved by this court.[14] We are not persuaded to revisit these prior holdings.

Scholl also argues that the statutory definition of "deadly weapon" in NRS 193.165 is unconstitutionally vague and overbroad. We have previously held that the statute is not vague and have indicated that it is not overbroad.[15] We conclude that the statute gave Scholl sufficient

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[13]See, e.g., Leonard v. State, 114 Nev. 1196, 1208, 969 P.2d 288, 296 (1998) (affirming use of instruction containing "in contradistinction to accident or mischance"); Guy v. State, 108 Nev. 770, 776-77, 839 P.2d 578, 582 (1992) (affirming use of instruction containing "with reckless disregard of consequences and social duty").

[14]See, e.g., Collman v. State, 116 Nev. 687, 712-13, 7 P.3d 426, 442 (2000); Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 482-83 (2000).

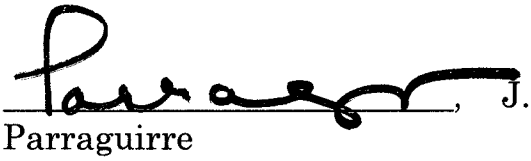
[15]See, e.g., Hernandez v. State, 118 Nev. 513, 527-28 50 P.3d 1100, 1110-11 (2002).

notice that a brick and gasoline, when used in the manner Scholl used them (to strike blows to the head and to set someone on fire, respectively) were deadly weapons for the purpose of sentence enhancement.

Finally, Scholl argues there was insufficient evidence to support the torture aggravating circumstance[16] found by the jury due to an allegedly improper instruction on the aggravator. Because Scholl did not receive the death penalty, we conclude that this claim is moot.

Having reviewed Scholl's arguments and concluded he is entitled only to the relief set forth above, we

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



_____, J.
Parraguirre

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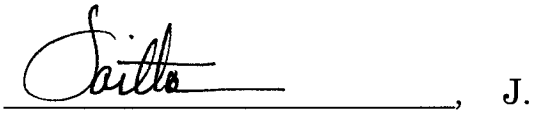

_____, J.
Saitta

cc: Hon. Jennifer Togliatti, District Judge
Special Public Defender David M. Schieck
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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[16]See NRS 200.033(8).